Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1978

No. 78-1423

J. JEROME OLITT,

Petitioner,

-against-

FRANCIS T. MURPHY, JR., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

J. JEROME OLITT,

Petitioner,

-against-

FRANCIS T. MURPHY, JR., individually, as Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and as Administrator concerning the conduct of members of the New York Bar, ARTHUR MARKEWICH, MYLES J. LANE, SAMUEL J. SILVERMAN, HAROLD BIRNS, JOSEPH P. SULLIVAN, THEODORE R. KUPFERMAN, HERBERT EVANS, ARNOLD FEIN, LEONARD SANDLER and VINCENT A. LUPIANO, individually, as Associate Justices of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and as Administrators concerning the conduct of members of the New York Bar, JOSEPH J. LUCCHI, individually and as Clerk of the Appellate Division of the Surpeme Court of the State of New York, First Judicial Department, JAMES D. PORTER, JR., individually and as Counsel to the Committee on Grievances of the Association of the Bar of the City of New York, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT, SHELDON OLIENSIS, individually and as Chairman of the Committee on Grievances of the

[cont'd]

Association of the Bar of the City of New York, and WILLIAM E. JACKSON, RICHARD KUH, LOLA S. LEA, MATTHEW J. MALLOW, ARCHIBALD R. MURRAY, ALFRED H. SCOTTI, WILLIAM B. O'BRIEN, ANGELO T. COMETA, EMELIO P. GAUTIER, JOHN DONOVAN, STEVEN H. STEIN, M. MORAN WESTON, JOHN G. McGOLDRICK, GEOFFREY M. KALMUS, MARTIN LONDON, DONALD B. STRAUSS, EDWARD J. BABB, JOHN W. CASTLES III, EDWIN H. WESLEY, HAYWOOD BURNS, EVELYN HALPERT, SELVYN SEIDEL, HELENE M. BARNETTE, JOHN H. DOYLE III, WILLIAM H. GILBRETH, DAVID RAMAGE, JR., ALVIN H. SCHYLMAN, individually and as members of the Committee on Grievances of the Association of the Bar of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Second Circuit, entered November 16th, 1978.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Second Circuit (App. A. infra) is not yet reported.

JURISDICTION

The Order of the United States Court of Appeals for the Second Circuit was entered on November 16th, 1978. A Petition for Rehearing was denied by said Court on January 4th, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether, under the rulings in Burford v. Sun Oil Co., 319 U.S. 315; Alabama Public Service Comm'n. v. Southern R. Co., 341 U.S. 341; Willcox v. Consolidated Gas Co., 212 U.S. 19, 40; Louisiana P. & L. Co. v. Thibodaux, 360 U.S. 25, 29; Harrison v. NAACP, 360 U.S. 167, 177; Townsend v. Sain, 372 U.S. 293, 312-319; NAACP v. Button, 371 U.S. 415; Government Employees v. Windsor, 353 U.S. 364; and England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, a litigant, who has properly invoked the jurisdiction of the Federal District Court to consider federal constitutional claims and following the Federal District Court's abstention reserved in the State Court his right to return to the Federal District Court for the resolution of his federal constitutional claims, can be compelled, without his consent and through no fault of his own, to accept instead a State Court's determination of those claims?

2. Whether, under the rulings in Burford v. Sun Oil Co., 319 U.S. 315; Alabama Public Service Comm'n. v. Southern R. Co., 212 U.S. 341; Willcox v. Consolidated Gas Co., 212 U.S. 19, 40; Louisiana P. & L. Co. v. Thibodaux, 360 U.S. 25, 29; Harrison V. NAACP, 360 U.S. 167, 177; Townsend v. Sain, 372 U.S. 293, 312-319; NAACP v. Button, 371 U.S. 415; Government Employees v. Windsor, 353 U.S. 364; and England v. Louisiana State Board of

Medical Examiners, 375 U.S. 411, res judicata is an affirmative defense to a Federal Civil Rights Action predicated upon a State Court Judgment rendered subsequent to an involuntary State Court litigant's express reservation of right to litigate his federal issues in the Federal Court?

STATEMENT OF FACTS

Petitioner is an attorney at law presently suspended from the practice of law in the Courts of the State of New York, although in good standing with various Federal Courts. He was admitted to practice in the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, in June of 1954. In October of 1968, petitioner was called to testify before a Grand Jury of the New York Supreme Court, New York County, at which time he refused to testify on the ground, inter alia, that his Answers to the questions propounded might tend to incriminate him. Thereupon, the Grand Jury, at the recommendation of the New York County District Attorney, granted petitioner immunity from any state action or violation arising out of or incident to his testimony before it.

Simultaneously, petitioner claims, the New York County District Attorney promised not to initiate or refer the subject matter of his investigation to the Committee on Grievances of the Association of the Bar of the City of New York ("Grievance Committee").

Thereafter, petitioner testified fully, freely and truthfully, pursuant to the grant of immunity in October and November of 1968.

In November of 1969, petitioner has alleged that the District Attorney violated his promise

by specifically alerting counsel to the Grievance Committee to petitioner's involvement with the State Grand Jury investigation.

In February of 1971, the District Attorney made an ex-parte application to one of the Justices of New York Supreme Court for an Order authorizing him to turn over to the Grievance Committee the minutes of petitioner's immunized Grand Jury testimony. The application was granted and the minutes were turned over to counsel to the Grievance Committee.

Counsel for the Grievance Committee delayed the eventual commencement of the State Court Disciplinary Proceeding against petitioner until May of 1973. Petitioner claims that such delay was without any justification therefore and inured to his severe prejudice due to the death of potential witnesses, the unavailability of evidence, and the general dimming of memories.

During May of 1973, the Grievance Committee instituted disciplinary proceedings against the petitioner based solely and exclusively upon his testimony under the grant of immunity before the New York County Grand Jury. The Grievance Committee failed and refused, despite petitioner's application therefor to preclude the use of petitioner's State Grand Jury testimony and the Grievance Committee used the minutes of this testimony against petitioner in hearings before it as well as the hearing ordered by the Appellate Division.

In 1974, petitioner commenced an action in the United States District Court for the Southern District of New York seeking redress for the aforesaid claimed denial of his constitutional rights. By Order dated July 31st, 1974, the District Court

dismissed the Complaint upon the ground of abstention. Thereafter, the United States Court of Appeals for the Second Circuit affirmed and this Court denied certiorari.

Thereafter, and at every stage of the State Court Disciplinary Proceeding, petitioner specifically reserved his right to litigate his federal constitutional claims in the Federal Court. His Answer to the Petition therein, the motion submitted to the State Court and indeed the Opinion of the Referee appointed by the Appellate Division to hear and report contained specific and explicit references to this reservation of rights.

At the hearing before the court-appointed Referee, petitioner's state of mind was put into issue by the charges against him. The question involved whether he believed certain things to be true some years back. Notwithstanding this, the State Court refused to allow petitioner to introduce into evidence testimony as to his state of mind, specifically testimony of Polygraph Experts, one of whom has previously testified before the Grievance Committee to the effect that petitioner was telling the truth when he denied knowledge of illegality in connection with the operative events which resulted in the State Court Disciplinary Proceeding.

Thereafter, the Grievance Committee filed a motion in the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, seeking to confirm the Referee's Report insofar as it found petitioner guilty of professional misconduct, to disaffirm the Referee's Report insofar as it recommended liency to be extended to the petitioner, and sought to impose discipline upon him. Petitioner cross-moved for a stay of the imposition of discipline upon him

upon the ground, inter alia, that the State Court lacked jurisdiction to impose discipline upon him because he had reserved his right to litigate his federal questions in the Federal Court.

In February of 1978, and before the State Court had ruled on this motion, petitioner commenced a second action in the United States District Court for the Southern District of New York seeking a declaration that the State Court was without jurisidiction to discipline him pending Federal Court determination of his Federal Court claims and immediately moved for Summary Judgment and for a Preliminary Injuction. The District Court dismissed the Complaint, without prejudice, on the ground of abstention. No appeal was taken from this Order.

On March 7th, 1978, the Appellate Division issued its Order confirming the Report of the Referee, suspending petitioner from the practice of law "in any form" for a period of three-years effective April 7th, 1978, until the further Order of the Court, and denying his cross-motion to stay the imposition of discipline.

On March 21st, 1978, the Appellate Division by an Order predicated upon a written Stipulation extended the time within which petitioner may wind up and complete on behalf of certain clients, all matters which were pending on behalf of those clients on March 7th, 1978. This Stipulation Order permitted petitioner to practice in such a limited manner until and including June 6th, 1978.

On March 27th, 1978, petitioner wrote to the Chief Counsel of the Grievance Committee asking for a clarification of an apparent conflict between the Order suspending him and this Court's Opinion In Re: Ruffalo, 20 L.Ed.2d 1436, in that

a fair reading of the Appellate Division's Order reveals that it suspended petitioner from the practice of law in all Courts inclusive of the Federal Courts and the holding of this Court In Re: Ruffalo is to the contrary. This letter remains unanswered.

Shortly thereafter, petitioner commenced his third action in the United States District Court for the Southern District of New York. Again, petitioner's case was dismissed on the grounds of abstention. Petitioner appealed the District Court's Order to the United States Court of Appeals for the Second Circuit and by Order dated May 16th, 1978, the United States Court of Appeals for the Second Circuit dismissed the appeal.

At the same time as the District Court dismissed petitioner's third appeal, he filed a Notice of Appeal as of right in the New York State Court of Appeals and also moved there for leave to appeal from the Appellate Division Order of Susension.

On May 14th, 1978, the New York State Court of Appeals denied petitioner's application for leave to appeal and dismissed the appeal taken as right.

Having then exhausted all State Appellate remedies, petitioner commenced his fourth action in the United States District Court for the Southern District of New York seeking redress of claimed violations of his Constitutional Rights, which he asserted he expressly reserved for the District Court. Those claims were:

1. That the use of petitioner's immunized Grand Jury testimony was in derrogation of his

Fifth Amendment rights;

2. The District Attorney's alerting, contrary to his representation, the Grievance Committee to petitioner's Grand Jury testimony and his participation in the events, thus bringing into play the United States Court of Appeals for the Second Circuit's Decision in Palermo v. Warden, 545 F.2d 286, cert. dismissed, 431 U.S. 911 (1977);

3. The Grievance Committee's laches in instituting disciplinary proceedings in violation of petitioner's right to a speedy trial;

4. The Referee's exclusion of petitioner's Polygraph Expert's testimony, thereby denying the petitioner the right to a fundamentaly fair trial; and

5. The ex-parte Order authorizing transmission of the immunized testimony violated petitioner's due process rights.

Petitioner also claimed that the Order susending him from the practice of law "in any form" violated this Court's ruling In Re: Ruffalo, 20 L.Ed.2d 1436.

Basing these claims upon 42 U.S.C. §1982, petitioner sought in the District Court Declaratory and Injunctive Relief barring the Appellate Division from imposing any disciplinary sanction against him pending Federal Court determination of his Federal Constitutional Claims, absent which petitioner contended that the State Court lacked jurisdiction; and predicated upon 28 U.S.C. §1331 and §1343, petitioner sought in the District Court a Judgment declaring that the Appellate Division's Order of Suspension was null and void and a further decla-

ration that the Appellate Division's Order does not by itself automatically carry with it suspension from practice in the Federal Courts.

Petitioner moved for a Preliminary Injunction and the New York State Attorney General's office, representing the Justices of the Appellate Division, cross-moved for dismissal of the Complaint upon the grounds of abstension and res judicata-collateral estoppel.

The District Court denied the Motion for a Preliminary Injunction and dismissed the Complaint.

Upon appeal to the United States Court of Appeals for the Second Circuit, the Order of the District Court was unanimously affirmed substantially on the Opinion of the District Court. However, the Court noted that the petitioner "also sought relief by way of Declaratory Judgment that the three-part Order of relief set forth in Exhibit 'B' attached to the Complaint herein and constituting the Order of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on March 7th, 1978, does not and cannot in and of itself preclude his practice of law before the Federal Courts, absent federal disciplinary proceedings. At argument counsel for appellees conceeded that the Appellate Division Order does not pertain to practice in the Federal Courts, which is governed by the Federal Rules, and in the case that the United States District Courts for the Southern and Eastern District of New York, General Rule 5."

On January 4th, 1979, petitioner's application for rehearing was denied.

OPINION OF THE COURT OF APPEALS

The Opinion of the Court of Appeals (App. A., infra), in effect provided petitioner with part of the declaratory relief sought by him in his District Court Complaint: It declared that the State Court Order of Suspension did not affect petitioner's right to practice in the Federal Courts.

However, the Court of Appeals did hold that res judicata is an affirmative defense to Federal Civil Rights Claims where the federal plaintiff is an involuntary state litigant. Moreover, the Court of Appeals did state that:

> "Judge Oakes notes that he takes the same position here relative to Thistlethwaite v. City of New York, 497 F.2d 339, 346 (2d Cir.), cert. denied, 416 U.S. 906 (1974), as stated in his concurring opinion in Turco v. Monroe County Bar Association, 554 F.2d 515, 522, (2d Cir.), cert. denied, 434 U.S. 834 (1977): absent an en banc he is bound by the decision of this court on the subject of res judicata of federal civil rights claims where the federal plaintiff is an involuntary state litigant."

In Turco, supra, Judge Oakes' concurring opinion strongly urged:

> "I believe that Thistlethwaite v. City of New York, 497 F2d 339 (2d Cir.), cert. denied, 419 U.S. 1093, 95 S.Ct. 686, 42 L.Ed.2d 686 (1974), and Tang v. Appellate Division, 487 F.2d 138, 141 (2d Cir. 1973), cert. denied, 416 U.S. 906, 94 S.Ct. 1611,

40 L.Ed.2d 111 (1974), were wrongly decided, for the reasons stated in my dissenting opinions in those cases. Thistlethwaite, like this case, involved an assertion of federal rights in a state proceeding by an involuntary party to that proceeding; Tang was erroneously supposed to involve an election to pursue state remedies, which an applicant for admission to the bar was said to make merely by applying for admission. I note that Thistlethwaite is inconsistent with several cases from other circuits, see Theis, Res Judicata in Civil Rights Act Cases: An Introduction to the Problem, 70 Nw.L.Rev. 859, 865-66 & n. 35 (1976), and that the Sixth Circuit agrees with the dissenting opinion in Tang, Getty v. Reed, 547 F.2d 971, at 974-979 (6th Cir. 1977). But unsound as I believe Thistlethwaite and Tang to be, emasculative as they are of 42 U.S.C. §1983 and federal constitutional rights, I am bound to follow them as the law of the circuit. I therefore reluctantly concur in the judgment of the court." [554 F2d 522]

In Thistlethwaite, supra, Judge Oakes' dissenting oponion stated:

"I dissent. The decision of the majority, without citation to any relevant authority, for the first time to my knowledge, applies to the doctrine of res judicata or collateral estoppel to bar a §1983 action challenging the constitutionality of a law solely on the basis that the

plaintiff has been at one time convicted of a Violation of that law. As such the majority opinion in an entirely unwarranted extension of the decisions of this court on collateral estoppel in civil rights actions; it is contrary to the underlying law of collateral estoppel generally; and it set a precedent in the area of first amendment challenges that it, to say the least, unfortunate." [497 F.2d 343]

ARGUMENT

No litigant, who has properly invoked the jurisdiction of the Federal District Court to consider Federal Constitutional Claims and following the Federal District Court's abstention reserved in the State Court his right to return to the Federal District Court for the resolution of his Federal Constitutional Claims, can be compelled, without his consent and through no fault of his own, to accept instead a State Court's determination of those claims. Nor can such a litigant have his right to proceed in the Federal Court summarily cut off on the theory of res judicata. The Court of Appeals' Order to the contrary totally emasculates 42 U.S.C. §1983.

There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of the Federal District Court to consider Federal Constitutional Claims can be compelled, without his consent and through no fault of his own, to accept, instead, a State Court's determination of those claims. (Cf. Burford v. Sun Oil Co., 319 U.S. 315; Alabama Public Service Commission v. Southern Railroad Co., 341 U.S. 341) Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional

authorization, has conferred specific categories of jurisdiction upon the Federal Courts, predicated upon the principle that "(w)hen a Federal Court is properly appealed to in a case in which it has by law jurisdiction, it is its duty to take such jurisdiction . . . The right of a party plaintiff to choose a Federal Court where there is a choice cannot be properly denied." (Willcox v. Consolidated Gas Co., 212 U.S. 19, 40) Nothing in the abstention doctrine requires or supports such a result. (England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 415) Abstention's recognition that the State Courts must be the final determinators of the State Law implies no disregard of the primacy of the federal jurisdiction in deciding questions of federal law. (See, Kourland, Towards a Co-Operative Judicial Federalism, The Federal Court Abstention Doctrine, 24 F.R.D. 481, 487) As a result, this Court has frequently held that abstention "does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise." (Harrison v. NAACP, 360 U.S. 167, 177; Accord, Louisiana P. & L. Co. v. Thibodaux, 360 U.S. 29)

It may be argued that after a possible abstention determination and rejection of a litigant's federal claims by a State Court, a litigant could seek direct review by this Court. However, "even when available by appeal, rather than by discretionary writ of certiorari, (such review) is an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the Federal Courts. This is true as to issues of law. It is equally true as to issues of fact." (England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 416)

To limit the litigant to review by this Court would be to deny the litigant the benefit of a Federal Trial Court's role in constructing the Record

and making fact findings. How the facts are found frequently dictates the Court's decision as to federal claims. "It is typical, not the rare case, in which constitutional claims turn upon the resolution of contested factual issues." (Townsend v. Sain, 372 U.S. 293, 312) "There is also in litigation a margin of error, it being error in fact finding . . . " (Speiser v. Randall, 357 U.S. 513, 525)

In "cases where, but for the application of the abstention doctrine the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination." (England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 417) Respondents have argued that such rule applies only in cases where the abstention is classified as arising under the Pullman (Railroad Commission v. Pullman Co., 312 U.S. 496) variety. However, this Court did not limit the application of this principle to Pullman abstention and accordingly it is equally applicable to all forms of abstention. Assuming arguendo, that England merely interprets Pullman, it is argued that the principles underlying England are equally applicable to all forms of abstention. The rationale which this Court used to predicate its holding in England is equally applicable to all forms of abstention and, we respectfully submit, it is merely happenstance that the first case presented to this Court on this issue arises out of a case of Pullman abstention. It could just as easily have arisen out of a case involving Younger (Younger v. Harris, 401 U.S. 37) abstention.

To insert the word "Pullman" into this Court's decision in England and thereby limit the applicability of England to only one of the four overlapping types of abstention would be to paraphrase this Court's Decision to the extent of modifying its holding.

The possibility of appellate review of a State Court's determination by this Court may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the Federal Courts. (NAACP v. Button, 371 U.S. 427) "A party has the right to return to the District Court after obtaining the authoritative State Court construction for which the Court abstained, for a final determination of his claim." (NAACP v. Button, supra)

These principles, expounded in England, are equally applicable to all forms of abstention. Whether or not England shall be used by this Court as a citation supporting petitioner's right to return to the District Court for the final determination of his federal claims may be subject to argument. However, petitioner's right to return is absolute. The holding of the Court below, that petitioner's claims are barred under the theory of res judicata, therefore is erroneous.

The Court below relied upon a line of cases supporting the general proposition that a litigant in a Federal Court is precluded from relitigating issues which were litigated and determined adversely to him in a prior State Court proceeding. However, the cases cited by the lower Court are inapplicable to the case at bar, in which petitioner's federal claims were not litigated in the State Court proceeding. Unlike the cases cited by the Court below, in the case at bar, following the Grievance Committee's use of petitioner's immunized Grand Jury testimony against him, petitioner sought redress in the District Court. He was prevented there from obtaining an adjudication by the application of the abstention doctrine. He thereafter did not litigate any of the federal claims in the State Court. In compliance with the holding contained in Government Employees v. Windsor, 353 U.S. 364, as interpreted

in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 420, petitioner exposed his claims to the State Court and informed the State Court specifically as to the substance of those claims, so that the state questions could be construed "in light of" those claims, expressly reserving his right to litigate his federal constitutional claims in the District Court thereafter. To deny certiorari is to place petitioner in an impossible quagmire. Originally, if one raised his federal claims in the State Court proceeding, he was barred thereafter from relitigating them in the Federal Court under the principle of res judicata. If he did not litigate his federal questions in the State Court, he was informed that he could have done so and was still prevented from obtaining a District Court adjudication thereof on the theory of res judicata. In England, this Court held that the litigant had an absolute right to a District Court determination; but that it was the litigant's duty to preserve that right and that the right could only be preserved in one way, to wit: by exposing and explaining to the State Court what his federal claims are, while simultaneously reserving his right to litigate them in the Federal Court. This is just what petitioner did in the case at bar.

Accordingly, to claim that petitioner may not pursue his claims in the District Court on the theory of res judicata is to reverse the majority in England by stating that either (a) petitioner has no right to a Federal Court adjudication of his federal claims; or (b) he has the right, but there is no conceivable procedure for exercising it.

Justice Douglas, in his concurring opinion in England, carefully explained "that the reservation of right" is perhaps the Supreme Court's way of permitting the litigant to avoid the consequence of

res judicata. (England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 428-429)

Res judicata may not be therefore a bar to the case because petitioner did not litigate his federal constitutional claims there: he merely explained the claims while simultaneously reserving his right to litigate them in the District Court.

THE IMPORTANCE OF THIS PETITION

This petition seeks to review a Decision of the United States Court of Appeals for the Second Circuit (a) in conflict with the Decisions of other Courts of Appeals on the same matter; (b) which has decided an important question of federal law which has not been, but should be, settled by this Court; and (c) which had decided a federal question in a way in conflict with applicable Decisions of this Court.

The Decision of the Court of Appeals brought up for review conflicts with the Decision of the Sixth Circuit on the same matter [Getty v. Reid, 547 F.2d 971 (1977)]. Prof. William H. Theis, identifying other conflicts in Res Judicata in Civil Right Act Cases: An Introduction to the Problem, 70 Nw.U.L.Rev. 859, 865, has stated that "the decisions of the lower courts teem with inconsistencies" in this matter. Theis appended the following footnote to illustrate his point:

> "Compare Thistlethwaite v. City of New York, 497 F.2d 339 (2d Cir.), cert. denied, 419 U.S. 1093 [95 S.Ct. 686, 42 L.Ed.2d 686] (1974), with Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 [95 S.Ct. 1400, 43 L.Ed.2d 656]

(1976); Roy v. Jones, 484 F.2d 96 (3d Cir. 1973), with Kauffman v. Moss, 420 F.2d 1270 (3d Cir.), cert. denied, 400 U.S. 846 [91 S.Ct. 93, 27 L.Ed.2d 84] (1970); Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), with Mack v. Florida State Bd. of Dentistry, 430 F.2d 862 (5th Cir. 1970), cert. denied, 401 U.S. 960 [91 S.Ct. 971, 28 L.Ed.2d 245] (1971) (White, J., dissenting from denial of writ); Coogan v. Cincinnati Bar Ass'n, 431 F.2d 1209 (6th Cir. 1970), with Mulligan v. Schlacter [Schlachter], 389 F.2d 231 (6th Cir. 1968); Blankner v. City of Chicago, 504 F.2d 1037 (7th Cir. 1974), with Hampton v. City of Chicago, 484 F.2d 602, 606 n. 4 (7th Cir. 1973); Francisco Enterprises, Inc. v. Kirby, 482 F.2d 481 (9th Cir. 1973), cert. denied, 415 U.S. 916 [94 S.Ct. 1413, 39 L.Ed.2d 471] (1974), with Ney v. California, 439 F.2d 1285 (9th Cir. 1971).

"For an analysis of these and other cases, see Averitt, Federal Section 1983 Actions After State Court Judgment, 44 U.Colo.L.Rev. 191 (1972); McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II, 60 Va.L. Rev. 250 (1974) [hereinafter cited as McCormack]; Vestal, State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court, 27 Okla.L.Rev. 185 (1974); Note, Relationship of Federal and State Courts, 88 Harv.L.Rev. 453 (1974); Comment, The Collateral Estoppel Effect of State Criminal Convictions in

Section 1983 Actions, 1975 U.Ill.1.F. 95 [hereinafter cited as Illinois Comment]." [865-66, n. 35]

Thus, the Court of Appeals has rendered a Decision in conflict with another Court of Appeals on the same matter and, more importantly, the Decisions of the various circuits teem with inconsistencies awaiting guidance from this Court. We are, therefore, presented with a vital question of federal law which has not been, according to the Circuit Courts, but should be, settled by this Court.

Furthermore, we respectfully submit that the Decision of the Second Circuit has decided a federal question in conflict with England and the cases therein cited.

Clearly the legislative history of the civil rights legislation as well as its judicial evolution do not permit its emasculation by the theory of res judicata. The arguments in support of the 1871 Civil Rights Act clearly indicate that it was to fulfill a needed remedy necessitated since the State Courts had not adequately protected those rights to be guaranteed by this legislation. The State Courts were thought to have applied a dual standard; one form of justice for Unionists and blacks and another form of justice for the Ku Klux Klan and its supporters [See Monroe v. Pape, 365 U.S. 167, 178 (1961) (quoting the remarks of Senator Pratt)].

Accordingly, Congress invested the Federal Trial Courts with original jurisdiction to enforce constitutional rights because the State Courts had failed to respect those rights. Previously, the State Courts had primary responsibility for enforcing the Constitution, checked only by this Court's

review. Now primary responsibility would be shifted by Act of Congress to the Federal Trial Courts.

Theis explained that the drastic nature of this shift of responsibility is highlighted by the fact that not until four years later did Congress provide the Federal Trial Courts with general "federal questions" jurisdiction. In Mitchum v. Foster, 407 U.S. 225 (1972), this Court, commenting on the 1871 Civil Rights Act, stated:

> "[L]egislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts."

To permit the res judicata effect of state litigation to operate as a bar to a federal civil rights action runs directly counter to this legislative distrust of the State Court judiciary as conscientious protectors of constitutional rights. Thus, the legislature never expected to have prior state litigation preclude a civil rights action where the federal plaintiff was an involuntary State Court litigant.

Significantly, this Petition brings up for review a case which is uniquely suitable for review by certiorari on the question of the res judicata effect of a State Court Judgment on a subsequent civil rights action in the Federal Court because in the case at bar the federal plaintiff was an invol-

untary State Court litigant who expressly reserved his right to litigate his federal constitutional questions in the Federal Court and he made this expression of his reservation of right at each and every stage of the State Court litigation, pursuant to this Court's holding in England, supra.

The legislative history behind the 1871 Act, to the extent that it evidences an attempt to permit the federal plaintiff to have a choice of forum, counsels against any expansive reading of res judicata. Only when the plaintiff has freely presented his constitutional claims for conclusive State Court resolution should relitigation be barred in the Federal Courts.

CONCLUSION

Petitioner respectfully prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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New York, New York,
March 5th, 1979

APPENDIX A

ORDER OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of November, one thousand nine hundred and seventy-eight.

Present:
Hon. J. Edward Lumbard,
Hon. Henry J. Friendly,
Hon. James L. Oakes,
Circuit Judges.

J. Jerome Olitt,
Appellant,

v. 78-7295

Francis T. Murphy, Jr., et al.,
Appellees.

ORDER

This cause came on to be heard from the United States District Court for the Southern District of New York and was argued by the appellant pro se and by counsel for the appellees.

ON CONSIDERATION WHEREFORE, it is now hereby ordered, adjudged and decreed that the opinion of said district court is affirmed substantially on the opinion of Judge Weinfeld below. Judge Oakes notes that he takes the same position here relative to Thistlethwaite v. City of New York,

497 F.2d 339, 346 (2d Cir.), cert. denied, 416 U.S. 906 (1974), and Tang v. Appellate Division, 487 F.2d 138, 143 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974), as stated in his concurring opinion in Turco v. Monroe County Bar Association, 554 F.2d 515, 522 (2d Cir.), cert. denied, 434 U.S. 834 (1977): absent an en banc he is bound by the decisions of this court on the subject of res judicata of federal civil rights claims where the federal plaintiff is an involuntary state litigant.

The court notes that appellant also sought relief by way of a declaratory judgment that the three-part order of relief set forth in Exhibit B attached to the complaint herein and constituting the order of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on March 7, 1978, does not and cannot in and of itself preclude his practice of law before the federal courts, absent federal court disciplinary proceedings. At argument counsel for appellees conceded that the Appellate Division order does not pertain to practice in the federal courts, which is governed by the Federal Rules, and in the case of the United States District Courts for the Southern District and Eastern District of New York, General Rule 5. While state disciplinary proceedings have an effect under General Rule 5,[1/] certain procedural and substantive protections may be available under that rule to counsel affected by those state proceedings.

/S/ J. EDWARD LUMBARD

/S/ HENRY J. FRIENDLY

/S/ JAMES L. OAKES
U.S. Circuit Judges

1. Rule 5(d) of the General Rules for the Southern District and Eastern District of New York provides in part:

> Any member of the bar of this court who shall be disciplined by a court in any State, Territory, other District, Commonwealth or Possession, shall be disciplined to the same extent by this court unless an examination of the record resulting in such discipline discloses (1) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not consistently with its duty accept as final the conclusion on that subject; or (3) that the imposition of the same discipline by this court would result in grave injustice; or (4) that the misconduct established has been held by this court to warrant substantially different discipline.
>
> Upon the presentation to the court of a certified or exemplified copy of the order imposing such discipline, the respondent attorney so disciplined shall, by order of the court, be disciplined to the same extent by this court, provided, however, that within 30 days of the service upon the respondent attorney of the order of this court disciplining him, either the respondent attorney or a bar association designated by the chief

judge in the order imposing discipline may apply to the chief judge for an order to show cause why the discipline imposed in this court should not be modified on the basis of one or more of the grounds set forth in this Paragraph (d).

APPENDIX B

OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

J. JEROME OLITT,

Plaintiff,

-against-

FRANCIS T. MURPHY, JR., individually, as Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and as Administrator concerning the conduct of members of the New York Bar, ARTHUR MARKEWICH, MYLES J. LANE, SAMUEL J. SILVERMAN, HAROLD BIRNS, JOSEPH P. SULLIVAN, THEODORE R. KUPFERMAN, HERBERT EVANS, ARNOLD FEIN, LEONARD SANDLER and VINCENT A. LUPIANO, individually, as Associate Justices of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and as Administrators concerning the conduct of members of the New York Bar, JOSEPH J. LUCCHI, individually and as Clerk of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, JAMES D. PORTER, JR., individually and as Counsel to the Committee on Grievances of the Association of the Bar of the City of New York, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK,

[cont'd]

FIRST JUDICIAL DEPARTMENT, SHELDON OLIENSIS, individually and as Chairman of the Committee on Grievances of the Association of the Bar of the City of New York, and WILLIAM E. JACKSON, RICHARD KUH, LOLA S. LEA, MATTHEW J. MALLOW, ARCHIBALD R. MURRAY, ALFRED H. SCOTTI, WILLIAM B. O'BRIEN, ANGELO T. COMETA, EMELIO P. GAUTIER, JOHN DONOVAN, STEVEN H. STEIN, M. MORAN WESTON, JOHN G. McGOLDRICK, GEOFFREY M. KALMUS, MARTIN LONDON, DONALD B. STRAUSS, EDWARD J. BABB, JOHN W. CASTLES III, EDWIN H. WESLEY, HAYWOOD BURNS, EVELYN HALPERT, SELVYN SEIDEL, HELENE M. BARNETTE, JOHN H. DOYLE III, WILLIAM H. GILBRETH, DAVID RAMAGE, JR., ALVIN H. SCHYLMAN, individually and as members of the Committee on Grievances of the Association of the Bar of the City of New York,

Defendants.

- -x

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EDWARD WEINFELD, D.J.

This is the fourth action instituted in this Court by plaintiff, an attorney who has been the subject of state bar disciplinary proceedings. In this, his latest action, he seeks to stay and void an order of the Appellate Division, First Department, suspending him from the practice of law for three years, which was entered upon a report of a Referee who had conducted a full evidentiary hearing. Plaintiff's three prior actions, discussed hereafter in greater detail, were dismissed under the doctrine of abstention because of the still pending state disciplinary proceedings. Following the dismissal of his third action, plaintiff returned to the state courts and filed as of right an appeal to the New York State Court of Appeals from the order of suspension and also moved for leave to appeal to that Court, both of which were dismissed for want of a substantial constitutional question.

In this current federal action, plaintiff seeks an adjudication of his federal constitutional claims, which he asserts he expressly reserved for this Court's decision under England v. Louisiana State Board of Medical Examiners. (1) Basing these claims upon 42 U.S.C. section 1983, plaintiff here seeks declaratory and injunctive relief barring the Appellate Division from imposing any disciplinary sanction upon him pending federal court determination of his federal constitutional claims, absent which he contends the state courts lack jurisdiction; a judgment declaring the Appellate Division order of suspension null and void and a declaration that

(1) 375 U.S. 411 (1964).

the Appellate Division order does not by itself automatically carry with it suspension from practice in the federal courts. (2) Plaintiff's essential claim is an absolute right to have the federal courts consider and pass upon those claims of violation of his federal constitutional rights. As stated by him, the key issue is "whether or not the State Court may discipline me pending the resolution of my Federal claims in this Court as a result of my reserving my rights to litigate those Federal questions involved in the State Court disciplinary proceedings in the United States District Court." The matter is now before the Court on plaintiff's motion for a preliminary injunction and the defendants' cross-motion to dismiss the complaint. (3)

The underlying factual situation which led to plaintiff's suspension was summarized by the Appellate Division in its per curiam order confirming the Referee's finding that plaintiff (there respondent) was guilty of professional misconduct: (4)

> The Referee found that in 1965 the respondent, representing a builder, sought to have a zoning change application, submitted on behalf of a rival

(2) Jurisdiction is alleged under 28 U.S.C. §§ 1331, 1343.

(3) The grounds of defendants' motion are failure to state a claim, lack of subject matter jurisdiction, "abstention (Younger type)" and res judicata-collateral estoppel.

(4) N.Y.L.J., Mar. 13, 1978, at 1, col. 3.

> builder, delayed. The respondent thereafter delivered money in cash to a person who claimed he could effect such delay.

In October, 1968, plaintiff, following the assertion of his Fifth Amendment privilege against self-incrimination, was granted transactional immunity and testified before a grand jury concerning his involvement in the above matter. He alleges that the District Attorney, in addition to this grant of immunity, represented that he would neither refer the subject matter of the investigation to the defendant Grievance Committee (the "Committee") nor himself initiate disciplinary proceedings. Allegedly through independent sources, the Committee became aware of plaintiff's involvement with both the factual situation and the grand jury proceedings. In February 1971, an ex parte application was made to a Justice of the State Supreme Court, who granted an order which made available the immunized testimony to the Committee. Disciplinary proceedings against plaintiff were instituted in January 1973, in the course of which plaintiff's immunized testimony was introduced as part of this Committee's case.

During the pendency of the disciplinary proceedings, plaintiff commenced the first of his federal actions, contending that the Committee's use of the immunized testimony violated his rights under the Fifth Amendment of the United States Constitution. This Court, per Judge Griesa, dismissed plaintiff's case due to the ongoing state proceed-

ing, (5) citing Younger v. Harris (6) and Erdmann v. Stevens, (7) the Second Circuit's decision applying Younger to bar disciplinary proceedings; Judge Griesa observed that plaintiff's future course should be "'the traditional method of obtaining adjudication of federal constitutional questions arising out of . . . disciplinary proceedings' -- i.e., state court action followed by request for Supreme Court review." Judge Greisa's dismisal of plaintiff's action was unanimously affirmed by our Court of Appeals, which relied not only upon Younger and its own decision in Erdmann, but also upon the then recently decided Huffman v. Pursue, Ltd., (8) stating: (9)

> Whatever federal constitutional questions are involved here can certainly be raised in the state courts and ultimately addressed to the Supreme Court, and appellant proffers no contrary contention.

(5) Anonymous v. Association of the Bar of the City of New York, No. 74 Civ. 2398 (TPG) (S.D.N.Y. July 31, 1974), aff'd, 515 F.2d 427 (2d Cir.), cert. denied, 423 U.S. 863 (1975).

(6) 401 U.S. 37 (1971).

(7) 458 F.2d 1205 (2d Cir.), cert. denied, 409 U.S. 889 (1972).

(8) 420 U.S. 592 (1975).

(9) Anonymous v. Association of the Bar of the City of New York, 515 F.2d 427, 432 (2d Cir.), cert. denied, 423 U.S. 863 (1975).

Plaintiff returned to the state courts, raising his Fifth Amendment claim as well as other federal constitutional claims as affirmative defenses. (10) At the same time, however, plaintiff expressly "reserv[ed] his right to litigate his Federal Constitutional Claims in the Federal court," as suggested in England v. Louisiana State Board of Medical Examiners. (11) After plaintiff's motion to dismiss the disciplinary proceedings on the basis of his affirmative defenses was denied by the Appellate Division, the Referee rendered his report sustaining the charges. The Committee moved to confirm the report and impose discipline; plaintiff cross-moved to stay the imposition of discipline, contending that because of his "England reservation" the Appellate Division was without jurisdiction to impose discipline prior to resolution of plaintiff's federal claims in federal court.

During the pendency of the foregoing motion and cross-motion, plaintiff commenced his second federal action, seeking an order enjoining the state's imposition of discipline until his federal claims were resolved in the federal courts. Again, the action was dismissed on Younger/Huffman grounds. (12) Judge Ward also noted, however, that plaintiff's purported reliance on England was "misplaced because the procedures formulated in that case relate specifically to the Pullman doctrine of abstention (13) . . . not to the Younger

(10) See text accompanying notes 21-23 infra.

(11) 375 U.S. 411 (1964).

(12) Olitt v. Murphy, No. 78 Civ. 744 (R.J.W.) (S.D.N.Y. Mar. 8, 1978).

(13) Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

doctrine which abstention in plaintiff's federal action has been premised." Upon dismissal of plaintiff's second federal action, the Appellate Division entered an order confirming the Referee's report and ordering plaintiff suspended for a period of three years.

Shortly thereafter, plaintiff commenced his third federal action, again seeking a declaration that the state was without jurisdiction to impose discipline pending resolution in this Court of his federal constitutional claims. Again, plaintiff's case was dismissed on Younger grounds (14) as he had not yet exhausted his state appellate remedies as required under Huffman. (15) Again, plaintiff was told that his reliance upon England was misplaced -- indeed, the Court restated the Second Circuit's comment quoted above.

Plaintiff then filed a notice of appeal as of right in the New York State Court of Appeals and also moved there for leave to appeal from the Appellate Division order of suspension. (16) Although continuing to contend that his federal claims were reserved for federal court determination, he claimed an appeal as of right "upon the

(14) Olitt v. Murphy, No. 78 Civ. 1473 (EW) (S.D.N.Y. Apr. 8, 1978).

(15) See Huffman v. Pursue, Ltd., 420 U.S. 592, 607-11 (1975); Anonymous v. Association of the Bar of the City of New York, 515 F.2d 427, 434-35 (2d Cir.), cert. denied, 423 U.S. 863 (1975).

(16) See N.Y. Civ. Prac. L. §§ 5601(b), 5602(a); N.Y. Jud. L. §90(8).

ground that there is directly involved the construction of the United States Constitution." The proffered claims of violations of federal constitutional rights and also the grounds in support of plaintiff's motion for leave to appeal were: (a) the use of his immunized grand jury testimony in derrogation of his Fifth Amendment rights; (b) the Distict Attorney's alerting, contrary to his representation, the Grievance Committee to plaintiff's grant jury testimony and his participation in the events, thus bringing into play the Second Circuit's decision in Palermo v. Warden, 545 F.2d 286 (2d Cir. 1976), cert. dismissed, 431 U.S. 911 (1977); (c) defendants' laches in instituting the disciplinary proceeding in violation of plaintiff's right to a speedy trial; (d) the referee's exclusion of plaintiff's polygraph expert's testimony, thereby denying plaintiff the right to a fundamentally fair trial; and (e) the ex parte order authorizing transmission of the immunized testimony violated plaintiff's due process rights. As already noted, the New York Court of Appeals denied plaintiff leave to appeal and dismissed the appeal as of right on the ground that "no substantial constitutional question is directly involved." Thereupon the order of suspension became effective as of May 10, 1978.

Plaintiff then commenced this, his fourth federal action. The constitutional issues he seeks to have adjudicated are exactly the same five listed above presented to the state courts. He nevertheless contends that since he expressly reserved these issues for this Court's decision by his purported England reservation, he is entitled to have this Court pass upon and decide them.

Plaintiff's persistent and stubborn reliance upon England v. Louisiana State Board of Medical Examiners (17) is misplaced. As plaintiff is been repeatedly told, England is simply irrelevant when a federal court has dismissed a case on Younger/Huffman grounds. England is an adjunct of Pullman abstention and provides that where constitutional challenge is made to a state statute in federal court, and that statute is susceptible of construction avoiding or modifying the federal questions presented, the federal plaintiff will be required to obtain an authorative construction of that statute in the state court; and, if England is thus observed, that plaintiff is assured a return to the pending federal suit to litigate the federal claims. (18) When a state proceeding is pending and Younger applies, however, the

(17) 375 U.S. 411 (1964).

(18) See, e.g., Juidice v. Vail, 430 U.S. 327, 347, 348 (1977) (Stewart, Jr., dissenting); Huffman v. Pursue, Ltd., 420 U.S. 592, 613, 616 n.2 (1975) (Brennan, J., dissenting); England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 415-16 (majority) 423-37 (Douglas, J., dissenting) (1964); Roy v. Jones, 484 F.2d 96, 100 (3rd Cir. 1973) ("It is apparent that the procedures outlined in England were engrafted onto the law of abstention to insure that implementation of the Pullman doctrine not run afoul of Congressional mandate.") See generally Field, Abstention in Civil Cases: The Scope of the Pullman Abstention Doctrine, 122 U. Pa. L. Rev. 1071 (1974).

federal case is dismissed and the constitutional claims are to be presented in the state proceedings. (19)

Plaintiff not only had the opportunity to present his federal constitutional claims in the state proceedings, in fact he did present them and they were there determined, notwithstanding his England reservations. Accordingly, those claims are barred under the doctrine of res judicata. (20) Three of plaintiff's present claims were offered as affirmative defenses and in support of his original motion to dismiss the proceedings: his Fifth Amendment claim, the Palermo violation of

(19) Gibson v. Berryhill, 411 U.S. 564, 577 (1973) ("Younger v. Harris contemplates the outright dismissal of the federal suit and the presentation of all claims, both state and federal, to the state courts."); see, e.g., Trainor v. Hernandez, 431 U.S. 434, 441 (1977), quoting Younger v. Harris, 401 U.S. 37, 45 (1971), quoting Fenner v. Boykin, 271 U.S. 240, 243-44 (1926) ("The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection."). See generally Note, Younger Grows Older: Equitable Abstention in Civil Proceedings, 50 N.Y.U.L. Rev. 870 (1975).

(20) "[A] litigant in a federal court is precluded from relitigating issues which were litigated and determined adversely to him in the prior state court proceeding." Winters v. Lavine, Dkt. No. 77-7101 at 6499 (2d Cir. Jan. 16, 1978). See, e.g., id. at 6497-98 and cases

promise claim, and his laches claim. When the Appellate Division denied plaintiff's motion to dismiss the desciplinary proceeding, as stated by the Referee, it thereby "resolved . . . all of the legal issues" except as otherwise directed. (21) The Appellate Division did direct the Referee to consider plaintiff's Palermo claim; the Referee did this, finding that no promise had in fact been made. (22) The Referee also considered plaintiff's laches claim, finding that the delay in instituting the proceedings resulted in no specific prejudice to plaintiff warranting barring the proceedings.(23) And as stated earlier, the Referee's report was confirmed by the Appellate Division.

These three claims, as well as the other two asserted herein were, as noted above, raised by plaintiff on his appeal to the Court of Appeals.

footnote 20 cont'd

there cited: Graves v. Olgiati, 550 F.2d 1327, 1328-29 (2d Cir. 1977); Newman v. Board of Educ., 508 F.2d 277, 278 (2d Cir.), cert. denied, 420 U.S. 1004 (1975); Lombard v. Board of Educ., 502 F.2d 631, 635-37 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975); Morpurgo v. Board of Higher Educ., 423 F. Supp. 704, 710 (S.D.N.Y. 1976), aff'd on opinion below, Dkt. No. 77-6164 (2d Cir. May 10, 1978).

(21) Referee's Report at 7, Matter of Olitt, N.Y.L.J., Mar. 13, 1978, at 1, col. 3.

(22) Id. at 35-43

(23) Id. at 32-35.

And although that Court dismissed summarily on the ground that no substantial constitutional question was directly involved, that decision was final and was on the merits. (24)

(24) See, e.g., Winters v. Lavine, Dkt. No. 77-7101 at 6505-06 (2d Cir., Jan. 16, 1978); Turco v. Monroe County Bar Ass'n, 554 F.2d 515, 521 (2d Cir.), cert. denied, 98 S. Ct. 122 (1977) ("[W]e must assume that the Court of Appeals' denial of an appeal as of right here, as well as of discretion, determined that the constitutional issues specifically raised were insubstantial on the merits."); Tang v. Appellate Division, 487 F.2d 138, 141 n.2 (2d Cir. 1973), cert. denied., 419 U.S. 1093 (1974); Lecci v. Cahn, 493 F.2d 826, 830 (2d Cir. 1974).

It cannot seriously be contended that the New York courts did not consider the merits of plaintiff's claims because of his England reservation. England's inapplicability to plaintiff's situation is patent; moreover, before the Appellate Division rendered its summary judgment decision or its order confirming the Referee's report, two federal courts had specifically told plaintiff to assert his federal claims in the state proceedings. And by the time plaintiff filed his appeal in the Court of Appeals, two other federal courts had specifically held that plaintiff's reliance on England was "misplaced." Finally, plaintiff grounded an appeal as of right on the federal constitutional questions his case presented, and opposed a motion to dismiss the appeal on the same basis. Thus any claim that the New York courts withheld judgment on plaintiff's federal claims -- the

Plaintiff complains that the dismissals of his three prior federal actions on abstention grounds forced him to litigate his constitutional claims in the state courts and that since he did not voluntarily elect to do so, the state court rulings should not be given preclusive impact -- in effect, that the double-pinch of Younger and res judicata should not completely close the federal courts to these federal claims. There may be those who question whether barring section 1983 plaintiffs from lower federal tribunals on principles of res judicata at all makes for sound federalism, especially where the federal plaintiff was an involuntary state court litigant. (25) But as our Court of Appeals noted in Turco v. Monroe County Bar Ass'n, that contention "was foreclosed in this circuit by our decision in Thistlethwaite v. City of New York,

footnote 24 cont'd

only issued raised in defense and on appeal -- because of plaintiff's England reservation is wholly specious.

(25) See, e.g., Turco v. Monroe County Bar Ass'n, 554 F.2d 515, 522 (2d Cir.) (Oakes, J., concurring), cert. denied, 98 S. Ct. 122 (1977); Thistlethwaite v. City of New York, 497 F.2d 339, 346 (2d Cir.) (Oakes, J., dissenting), cert. denied, 416 U.S. 906 (1974); Note, Younger Grows Older: Equitable Abstention in Civil Proceedings, 50 N.Y.U.L. Rev. 870, 912-21 (1975).

(26) 554 F.2d 515, 520 (2d Cir.), cert. denied, 98 S. Ct. 122 (1977).

497 F.2d 339 (2d Cir.), cert. denied, 419 U.S. 1093 (1974), in which the very argument was made and rejected." As the Court explained: (27)

> State courts, as much as federal courts, are bound by and required to follow the United States Constitution. Turco, as appelles did in Huffman v. Pursue, Ltd., . . . is "urging [the Court] to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities." And like the Supreme Court, "[t]his we refuse to do." 420 U.S. at 611.

Finally, it is noted that our Court of Appeals has commented that it "has been particularly chary of intrusion into the relationship between the State and those who seek license to practice in its courts." (28) Plaintiff's suit here seeks to cast this Court as an appellate court to the highest court in New York State (29) -- and in that instant situation

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(27) Id.

(28) Tang v. Appellate Division, 487 F.2d 138, 143 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974). See, e.g., Turco v. Monroe County Bar Ass'n, 554 F.2d 515 (2d Cir.), cert. denied, 98 S. Ct. 122 (1977); Erdmann v. Stevens, 458 F.2d 1205 (2d Cir.), cert. denied, 409 U.S. 889 (1972); Mildner v. Gulotta, 405 F. Supp. 182 (E.D.N.Y. 1975) (three-judge court), aff'd, 425 U.S. 909 (1976).

(29) See Turco v. Monroe County Bar Ass'n, 554 F.2d 515m 521m 522 n.11 (2d Cir), cert. denied,

situation there is but one federal tribunal, the Supreme Court of the United States, that has such jurisdiction.

Plaintiff's motion for a preliminary injunction is denied. The motion to dismiss the complaint is granted.

It is so ordered.

Dated: New York, New York
May 22, 1978

EDWARD WEINFELD
United States District Judge

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footnote 29 cont'd

88 S. Ct. 122 (1977); Tang v. Appellate Division, 487 F. 2d 138, 141-42 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974).

Supreme Court, U. S.
FILED
JUN 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1423

J. JEROME OLITT,

Petitioner,

against

FRANCIS T. MURPHY, JR., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents request that the petition for a writ of certiorari be denied. There are no issues truly presented which warrant review by this Court.

Opinions Below

The summary order and opinion of the Court of Appeals for the Second Circuit was dated November 16, 1978. It is noted on 591 F. 2d 1331 as a decision without a published opinion and is reproduced as Appendix "A" to the petition. The Court of Appeals denied a petition for rehearing on January 4, 1979. The opinion of the District Court is reported at 453 F. Supp. 354 and is reproduced as Appendix "B" to the petition.

Jurisdiction

The jurisdiction of this Court to review the order below rests on 28 U.S.C. § 1254(1).

Questions Presented on the Petition

1. Did the Court of Appeals (and the District Court) correctly apply *res judicata* to petitioner's case and does this warrant review by the Supreme Court?

2. Was petitioner correct in seeking to invoke *England-Pullman* abstention in respect to the state proceeding leading to his suspension from the bar when he never had a federal court action pending when the state proceeding was commenced?

Facts

The facts of the case are set forth by the District Court at 453 F. Supp. at 355-358. Petitioner is a suspended attorney in New York who instituted numerous federal actions challenging the anticipated suspension while state proceedings were going forward. Petitioner's statement of the facts (Pet., pp. 4-10) is his own, peculiar version of what he was doing, sometimes *pro se,* sometimes represented by counsel. As noted, the Court of Appeals published no opinion, and "affirmed substantially" on the District Court opinion.

Reasons Why the Writ of Certiorari Should be Denied

There can be no doubt that petitioner's reliance on *England* v. *Louisiana Board of Medical Examiners,* 375 U.S. 411 (1964) is misplaced. His claim that after the start of state disciplinary proceedings he could enter the federal courts because he "reserved" his federal claims is absurd. His numerous prior federal actions were dismissed due to *Younger* v. *Harris,* 401 U.S. 37 (1971). This makes *England* inapplicable.

The reason *England* has no relevance to petitioner's case is that he never had a pending suit in federal court subject to *England* abstention (unsettled question of state law). Here the plaintiff was barred completely from the federal court due to *Younger* abstention (pending state court proceeding). The difference is significant and clearly set forth in *Juidice* v. *Vail,* 430 U.S. 327, 347-348 (STEWART, J., dissenting) (1977). As Justice Stewart notes, *Pullman**-*England* abstention does not altogether foreclose access to the federal courts. Of course *Younger* abstention, the only type ever applied to petitioner, *does,* except for an appeal to the United States Supreme Court. Furthermore, petitioner never presented an unsettled question of state law to the state or federal courts.

Petitioner's claim that the decision of the Court of Appeals herein conflicts with *Getty* v. *Reid,* 547 F. 2d 971 (6th Cir. 1977), petition, p. 18, is without merit. That case simply was a narrow procedural decision under the three-judge court statute (28 U.S.C. §§ 2281, 2284), now repealed. The proper grounds for such a court to dismiss such an application on an attorney's federal complaint was the issue there. Left open by the decision was a First Amendment claim. It did not see federal appellate review of state court decisions as involved.

For a discussion of *Getty* as to what was and was not decided, see *Maurice* v. *Board of Directors,* 450 F. Supp. 755, 759-760 (E.D. Va. 1977).

As to petitioner's basic case on the merits, his challenge to use of immunized testimony in attorney disciplinary matters, see 62 ALR 2d 1145 which states that the universal rule is to allow such use.

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* *Railroad Commission of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941).

The petitioner seeks to raise an insubstantial federal procedural question when his underlying claim is without any merit. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 606, n. 18 indicates that *res judicata* does apply to petitioner's case, where he never had a proper *England* abstention order entered and did litigate his federal claims in state court. *England* abstention can never be unilaterally invoked by the plaintiff (petitioner); it must be the subject of a federal court order of abstention.

CONCLUSION

The petition should be denied.

Dated: New York, New York
May 21, 1979

Respectfully submitted,

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Supreme Court, U. S.
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JUN 20 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

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-against-

FRANCIS T. MURPHY, JR., et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner submits this Reply Brief as a result of the impact of this Court's recent Opinion in Brown v. Felson, No. 78-58 [Argued February 21st, 1979 and Decided June 4th, 1979] and to place in proper perspective a statement contained in Respondent's Brief.

Point I

RES JUDICATA DOES NOT BAR A FEDERAL CIVIL RIGHTS ACTION WHERE THE BASIS OF THE RES JUDICATA IS A PRIOR STATE COURT PROCEEDING.

This Court's recent Opinion in Brown v. Felson, supra, bears remarkable similarity to the issues presented herein. In Brown, the Bankruptcy Court claims that it was barred, under the doctrine of res judicata, from making an adjudication that fraud was involved in the creation of the underlying debt so as to prevent the dischargeability thereof. The res judicata was based upon a Consent Judgment rendered in the State Court. The District Court affirmed, as did the Court of Appeals, and this Court reversed the holding that res judicata does not bar the Bankruptcy Court from making a determination as to the existence of fraud; that such question was, for the first time, squarely an issue; and that this is the type of question Congress intended that the Bankruptcy Court resolve.

Similarly, in the case at bar, the District Court complained that it was barred, under the doctrine of res judicata, from making a determination that Petitioner's civil rights were violated. This res judicata was based upon a Judgment rendered in the State Court. As with Brown, res judicata does not bar the Federal Court from making a determination as to a federal question, which, for the first time, is squarely in issue. Furthermore, violations of federal rights were intended by Congress to be resolved in the Federal Court.

As in Brown, there is substantial indication that Congress intended the fullest possible inquiry from the history of the statute [see Petition at pages 20-21].

In paraphrasing this Court's "summation" in Brown, we believe that this Court should reject Respondents' contention that res judicata applies here and hold that the District Court is not barred from adjudicating Petitioner's Civil Rights Action. Adopting the rule that res judicata bars a Civil Rights Action would clearly emasculate the Civil Rights Act and take such actions out of the Federal Courts and force those issues onto State Courts concerned with other matters, all contrary to the clear Congressional intent.

Point II

RESPONDENTS MISCONSTRUE GETTY v. REID, 547 F.2d 971 (6th Circuit, 1977).

Respondents' claim on page 3 of their Brief that "Petitioner's claim that the decision of the Court of Appeals herein conflicts with Getty v. Reid, 547 F.2d 971 (6th Circuit, 1977), Petition, p. 18, is without merit."

In Getty, the Court held that the Federal District Court had jurisdiction over Civil Rights Actions challenging State Disciplinary Statutes and State Disciplinary Rules since the Complaints were original Complaints which alleged state law violations and were not merely proceedings seeking Federal Appellate Review of State Court Decisions and further that relief from State Disciplinary Proceedings can be had upon proof of Federal Constitutional Violations.

Point III

PETITIONER HAS PRESENTED THE IDEAL CASE FOR REVIEW.

The case at bar is ideal for the review sought because the Petitioner specifically reserved his

right, at each and every stage of the State Court Proceeding, to litigate his federal questions in the Federal District Court. While the Petitioner relies in part, upon England v. Louisiana State Board of Medical Examiners, 373 U.S. 411, this Court may hold that England applies only to the Pullman doctrine of abstention and yet the principals underlying England are fully applicable to all forms of abstention.

There can be no res judicata effect in the case at bar because the involuntary State Court Litigant expressly reserved his right to litigate his federal questions in the Court which Congress has chosen for that purpose.

CONCLUSION

Petitioner respectfully prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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